

Evergreen Healthcare, Inc. d/b/a Willow Ridge Living Center and District 1199, Indiana/Iowa Union of Hospital & Healthcare Employees, SEIU, AFL-CIO. Case 25-CA-23106

June 15, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On April 21, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 25-RC-8900. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On May 17, 1994, the General Counsel filed a Motion for Summary Judgment. On May 20, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a memorandum in opposition to Motion for Summary Judgment and response to Notice to Show Cause. Thereafter, the General Counsel filed a memorandum in support of Motion for Summary Judgment and response to Respondent's memorandum in opposition to Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits the Union's request and its refusal to bargain and to furnish information that is relevant and necessary to the Union's role as bargaining representative, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).¹

¹ The Respondent bases its refusal to bargain and to provide information on its contentions that the factual and legal basis on which

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following²

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Fort Wayne, Indiana, has been engaged in the operation of a long term nursing facility.

During the 12-month period ending March 1, 1994, the Respondent, in conducting its business operations, purchased and received at its Fort Wayne, Indiana facility goods valued in excess of \$50,000 directly from points outside the State of Indiana. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held June 26, 1990, the Union was certified on February 17, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

All service and maintenance employees including nurse's aides, housekeeping, dietary, laundry, activity aides, and qualified medical assistants at the Employer's Fort Wayne, Indiana facility; but excluding office clerical, professional, guards and

the Board issued its certification of the Union was improper and that there has been such a substantial turnover in the bargaining unit since the election that there is no basis to believe that the Union represents a majority of the unit employees. With respect to the propriety of the Board's certification, this issue was determined in the underlying representation proceeding and cannot be relitigated in this proceeding. In regard to the unit turnover and size issue, the Respondent has not presented any evidence in support of this contention. In addition, this is not a matter properly raised as a defense to a refusal-to-bargain allegation where the Respondent is refusing to honor a Board certification. See, e.g., *Action Automotive*, 284 NLRB 251 (1987), *enfd.* 853 F.2d 433 (6th Cir. 1988), *cert. denied* 488 U.S. 1041 (1989), and *Murphy Bros.*, 265 NLRB 1574 (1982) (employee turnover not the kind of "unusual circumstance" within the meaning of the Supreme Court's decision in *Ray Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that would permit rebuttal of union's majority status during the certification year).

² We reject as without basis the Respondent's contention that the assignment of this unfair labor practice proceeding to the Board attorney who acted as the hearing officer in the representation case is a denial of due process. These are two separate proceedings and there is no evidence that this case assignment by the Regional Office in any way prejudiced the Respondent's rights in either case.

supervisors as defined in the Act and registered nurses and licensed practical nurses.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About February 22, 1994, the Union, by letter, requested the Respondent to bargain and to furnish information that is necessary and relevant to the Union's role as collective-bargaining representative of the unit, and, since about February 28, 1994, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after February 28, 1994, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Evergreen Healthcare, Inc. d/b/a Willow Ridge Living Center, Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District 1199, Indiana/Iowa Union of Hospital & Healthcare Employees, SEIU, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is

relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All service and maintenance employees including nurse's aides, housekeeping, dietary, laundry, activity aides, and qualified medical assistants at the Employer's Fort Wayne, Indiana facility; but excluding office clerical, professional, guards and supervisors as defined in the Act and registered nurses and licensed practical nurses.

(b) On request, furnish the Union information that is relevant and necessary to its role as the exclusive representative of the unit employees.

(c) Post at its facility in Fort Wayne, Indiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 25 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 1994

James M. Stephens, Member

Dennis M. Devaney, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District 1199, Indiana/Iowa Union of Hospital & Healthcare Employees, SEIU, AFL-CIO, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All service and maintenance employees including nurse's aides, housekeeping, dietary, laundry, activity aides, and qualified medical assistants at the Employer's Fort Wayne, Indiana facility; but excluding office clerical, professional, guards and supervisors as defined in the Act and registered nurses and licensed practical nurses.

WE WILL, on request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

EVERGREEN HEALTHCARE, INC. D/B/A
WILLOW RIDGE LIVING CENTER